The Webb-Kenyon Act of 1913[14] prohibits the shipment into a State of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold or used in violation of any law of such State. This law, also, is sought to be harmonized with the theory of absolute exclusiveness by contending that the test for the prohibition of an interstate shipment of liquor which Congress has thereby created is a uniform one,[15] that is, a rule of intent.[16] But, in effect, Congress is not prescribing a uniform rule of intent but is leaving it to the various States to determine whether or not liquor intended to be "received, possessed, sold, or used" shall be admitted within their borders.[17] And the court in *Grier* v. *State* (Del. 1913) 88 Atl. 579, in sustaining the Webb-Kenyon Act, seems in error, in reasoning that it can be sustained consistently with the doctrine of absolute exclusiveness over national subjects in that it provides a uniform rule of prohibition. It would seem preferable to hold squarely that Congress may decide, in its discretion, that uniformity as to a certain subject of interstate commerce of national scope is unnecessary and thereby admit the States into the field; and that its discretion, if reasonably exercised, will be upheld.[18]

MARSHALING OF SECURITIES.—In adjudicating the claims of two creditors to a *res* in which one has a claim to the whole while the other's interest is only in a part, it is established in equity that the prior claimant, having recourse to two funds, must first satisfy his demand out of that property of the debtor which the other cannot reach.[1] The rule can never be invoked to prejudice the prior creditor,[2] but if he should resort to the doubly charged fund when he can amply satisfy himself out of that which is singly liable, the subsequent demandant will be subrogated *pro tanto* to the other's rights in the singly charged fund.[3] It follows from this doctrine that one who purchases a part of the premises from the mortgagor without actual notice of the encumbrance, and neither assumes nor takes subject to

[14]37 U. S. Stat. at L. 699.

[15]The argument is similar to that used to justify the adoption by Congress in the Bankruptcy Act of 1898 of the state laws as to exemptions. See Hanover Bank *v.* Moyses (1902) 186 U. S. 181. But it was unnecessary to strain the meaning of uniformity, since it had been repeatedly held that the power of the States over bankruptcy was concurrent. Sturges *v.* Crowninshield (1819) 4 Wheat. 122; Ogden *v.* Saunders (1827) 12 Wheat. 213.

[16]Intent as a test for exclusion has been sustained as to the transportation of women for immoral purposes. Hoke *v.* United States (1913) 227 U. S. 308.

[17]This is emphasized by the fact that the act prescribes no penalty and no means for its enforcement.

[18]See Thayer, Cases on Constitutional Law, 2190, note.

[1]4 Pomeroy, Eq. Juris. (3rd ed.) § 1414. It has been said that if the "single" creditor is himself bound to the "double" creditor and the primary liability is personal, the former cannot have the assets marshaled as against the latter. See Dolphin *v.* Alyward (1870) L. R. 4 Eng. & Ir. App. Cas. 486, 505.

[2]1 Story, Eq. Juris. (13th ed.) § 633.

[3]Slade *v.* Van Vechten (N. Y. 1844) 11 Paige 21.

the mortgage,[4] acquires the right to have the land which is retained by the mortgagor subjected first to the satisfaction of the mortgage.[5] The justification for casting the burden of the mortgage, as between the grantor and grantee, upon the land retained by the former rests upon the form of the conveyance,[6] since the grantor's failure to mention the liability upon the land is assumed to indicate that he will save the grantee harmless. Therefore, some authorities deem it essential that the transfer be made by warranty deed,[7] while others are not so exacting.[8]

While this is a fair disposition of the rights of the immediate parties, a difficulty is encountered when the junior creditor in the doubly charged property invokes this doctrine of marshaling after the debtor has conveyed away that part of his property upon which there is only a single encumbrance.[9] The right to marshal in such a case is often enforced against the grantee as an equity, upon the ground that by the record of the two encumbrances he is charged with notice of the equitable relations of the parties.[10] Similarly successive mortgagees or grantees of separate parcels upon all of which there is a paramount encumbrance, generally hold their property liable to that obligation, in the inverse order of acquisition. The theory is that each by his conveyance has acquired the equity to first subject the land remaining in the hands of the common grantor to the first mortgage, and as between the respective transferees priority in time determines the strength of their equities.[11] But the contrary view regards marshaling as a mere equitable adjustment of the order in which the property shall be subjected to the respective claims. Its application, therefore, depends upon the interests existing at the time of its invocation.[12] This is the theory adopted in England;[13] and consequently the successive transferees are made to contribute ratably to the satisfaction of the prior encumbrance. This result is sometimes supported upon

[4]2 Jones, Mortgages (6th ed.) § 1625; see note to Chancellor of New Jersey *v.* Towell (N. J. 1912) 39 L. R. A. [N. S.] 359, 361; but see Hall *v.* Morgan (1883) 79 Mo. 47, which decided that the words "subject to" merely imposed a liability which the law would have placed on the land had the words been omitted.

[5]3 Pomeroy, Eq. Juris. (3rd ed.) § 1224; 2 Jones, Mortgages (6th ed.) § 1620; see Ingalls *v.* Morgan (1854) 10 N. Y. 178, 186. Even where the grantor's remaining property is within another jurisdiction it has been sold first to satisfy the mortgage. Welling *v.* Ryerson (1893) 94 N. Y. 98.

[6]Where the grantee takes subject to the mortgage his interest is rendered primarily liable to the mortgagee. Johnson *v.* Zink (1873) 51 N. Y. 333; see note to Boone *v.* Clark (Ill. 1889) 5 L. R. A. 276, 281.

[7]3 Pomeroy, Eq. Juris. (3rd ed.) § 1225; see Murray *v.* Fox (1887) 104 N. Y. 382, 393.

[8]See Jackson *v.* Condict (1898) 57 N. J. Eq. 522.

[9]2 Story, Eq. Juris. (13th ed.) § 1233.

[10]Conrad *v.* Harrison (Va. 1832) 3 Leigh 532; Robeson's Appeal (1888) 117 Pa. 628; Boucher *v.* Smith (Up. Can. 1862) 9 Grant Ch. 347.

[11]27 American Law Reg. [N. S.] 739, 753; 2 Jones, Mortgages (6th ed.) § 1621. This result is not based on contract. See Meek *v.* Thompson (1897) 99 Tenn. 732.

[12]Green *v.* Ramage (1849) 18 Oh. 428; Gillian *v.* McCormack (1887) 85 Tenn. 507.

[13]Barnes *v.* Racster (1842) 1 Y. & Coll. *401; *cf.* Going *v.* Farrell (1814) Beatty 472.

the unsatisfactory ground that a subsequent creditor by failing to take an express collateral charge is presumed to consent to the debtor's dealing with the property as singly encumbered.[14]

Newby v. *Fox* (Kan. 1913) 133 Pac. 890, presented a very interesting situation for the application of the principle of marshaling. N, having executed a mortgage upon his farm, sold it to M, who assumed payment of the mortgage and gave N a second mortgage on a part of the farm. The rest of the land, after several transfers subject to both mortgages, came into the hands of B, subject to only 36 per cent. of the first mortgage. Upon foreclosure of both mortgages N claimed the right to compel the holder of the first mortgage to satisfy as much of his claim as possible out of the fund derived from the sale of the land owned by B before resorting to the part by which the two mortgages were secured. The court upheld N's contention despite the fact that he was personally liable to the first mortgagee,[15] and notwithstanding B's position as purchaser subject to but 36 per cent. of the first encumbrance. This decision is the logical result of treating the right to marshal as an equity, but it cannot be justified if that right is considered as a mere device of equity for determining the order and method of satisfaction of several overlapping claims. Since the rule is invoked purely in the interest of justice, the view of marshaling which will secure the fairest distribution of the debtor's property should be adopted.[16] And rather than to place the entire burden of the first mortgage upon the singly encumbered tract it would be more equitable to compel the respective parcels to contribute each its ratable share.[17]

VESTED RIGHTS AND STARE DECISIS.—When the highest court of a State has several times decided that a plaintiff under a given state of facts has a cause of action does a subsequent decision in a case upon "all fours" with the previous cases, that the plaintiff has no cause of action, deprive the latter of a right, and if so, can he under the Federal Constitution secure a revision of the state decision by the Supreme Court?[1] This question is suggested by the recent case of *Oliver Co.* v. *Louisville Realty Co.* (Ky. 1913) 161 S. W. 570. For almost fifteen years the Kentucky Court of Appeals had consistently held that the statute making it unlawful for corporations to do business in the State without filing certain certificates with the Secretary of State did not avoid contracts made by corporations which had not complied with the law, but merely imposed a penalty for the non-observance of the statute.

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[14]Adams, Equity (8th ed.) 271, 273.

[15]The court in the principal case distinguished Dolphin *v.* Alyward, *supra*, on the ground that the land was primarily liable for the satisfaction of the first mortgage. See note 6, *supra*.

[16]18 Harvard Law Rev. 453.

[17]1 Story, Eq. Juris. (13th ed.) § 634a.

[1]It is well settled that when a case is brought into the federal courts because of diversity of citizenship those courts may refuse to follow a decision of the state court either because it overrules prior decisions upon which the parties to the suit have acted, see Rowan *et al. v.* Runnels (1847) 5 How. 134; Gelpcke *v.* Dubuque (1863) 1 Wall. 175; Great Southern Hotel Co. *v.* Jones (1904) 193 U. S. 532, or because, in the opinion of the federal courts, the state decision is unsound. See Burgess *v.* Seligman (1882) 107 U. S. 20.